

July 7, 2009

DEPT OF TRANSPORTATION
DOCTERS



Office of the Secretary
US Dept of Transportation
1200 New Jersey Ave, SE
West Building Ground Floor, Room W12-140
Washington, D.C. 20590-0001

Re: Docket No. OST-2009
ANPRM re Disadvantaged Business Enterprise Program; Potential Program
Improvements; Issued on March 25, 2009 (filed on April 7, 2009)

Ladies/Gentlemen:

Granite Construction Company has the following comments to the subject ANPRM in addition to the comments we submitted by letter dated July 1, 2009.

Issue 1 - DBE Credit for Items Obtained from Prime Contractor

In addition to favoring Option 3, as we stated in our July 1, 2009 comments, we have the following comments on the other Options discussed in the ANPRM:

Focusing on whether a DBE or non-DBE supplier furnished the supplies or equipment to the DBE subcontractor is not consistent with the intent of the program, i.e. to foster and develop the abilities of DBE subcontractors. Since DBE subcontractors supply a commercially useful function in connection with the obtaining for the project of the supplies and equipment they need to perform their portion of the project, DBE credit should be given for supplies and equipment obtained by a DBE subcontractor regardless whether they came from a DBE or non-DBE supplier. Eliminating DBE credit for supplies and equipment obtained by a DBE from any non-DBE sources (Option 4) will reduce the opportunities for DBE subcontractors to gain experience developing and managing large supply contracts because there are relatively few large DBE suppliers (especially material suppliers) and prime contractors will contract directly with non-DBE suppliers, to minimize their project risks and compliance costs associated with the DBE subcontractor's performance.

Similarly, there is no logical justification for the "intentional inconsistency" (Option 1) regarding supplies and equipment furnished by non-DBE suppliers who are not the prime contractor versus by non-DBE prime contractors. We believe it is common for prime contractors, like ourselves, who supply materials to subcontractors on its projects, to do so under separate purchase orders for the materials and to treat the materials transaction

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no differently than if there were no prime contractor-subcontractor relationship on the project. Thus, where the prime contractor is supplying the materials to the DBE subcontractor, the DBE subcontractor is furnishing all the same commercially useful function that it furnishes if the materials were furnished by any other non-DBE supplier. It negotiates price and payment terms, is responsible for the quality and quantity of the materials, and approves invoices from and makes payment to the prime contractor supplier. Accordingly, the materials included in the DBE subcontract should be eligible for credit regardless that they were supplied by the prime contractor versus some other non-DBE supplier. The rationale given in the ANPRM, that the situation of prime contractor as supplier is "too problematic" from an independence and CUF point of view, should not be a firm, fixed rule applied to disallow DBE credit in any such situation. For these reasons, and for the reasons cited in the ANPRM, Option 1 should not be followed.

Thus, we believe Option 3 is justified, as stated in our comments in our July 1, 2009 letter. If Option 3 were deemed too broad, then at the least Option 2 should be implemented (i.e., permit recipients to allow DBE credit for prime contractor-supplied materials in certain situations). The current "intentional inconsistency" approach is unjustified and can lead to the detrimental effects and situations acknowledged in the ANPRM.

Issue 2 - "Unbundling"

We first doubt that total opportunities for DBEs would be increased if larger contracts were broken up so that there were more smaller contracts DBEs could compete for with non-DBE's, as compared to the opportunities inherent to participate in larger contracts where there are DBE utilization goals and good faith efforts required. The program features inherent in larger contracts provide advantages to the DBE and for DBE participation that are not available in competitive contract situations with non-DBEs.

At the very least, it would be difficult if not impossible to fashion regulations and standards to say with reasonable certainty when opportunities for DBEs would be increased by unbundling and it would add costs and delay to recipients to make the kind of comparative demonstrations of such benefits that would likely be required under such regulations.

However, there are already requirements on larger projects to ensure subcontracts are structured to facilitate the utilization of small and DBE companies and these requirements are monitored by the DBE goals established for the projects.

In the race neutral contract area, while there are no specific small/DBE goals for a project, a requirement that the prime contractor must still make good faith efforts (GFE) to utilize small/DBE companies and help the recipient meet state wide goals is already in place. Recipients do not need to establish a goal for each project as long as the recipient meets the US DOT goal for the state through the voluntary actions of the prime contractors to continue GFEs and awarding of subcontracts to DBEs. Also, there is

nothing preventing DBEs from establishing Joint Ventures with other DBEs or even non-DBEs to accomplish larger projects. A good way to increase this type of DBE involvement is to encourage prime contractors to take on the role of mentor and assist DBEs in growing their expertise in accomplishing larger projects.

At the end of the ANPRM discussion on this topic, the Department solicits other suggestions to make contracts more accessible to small and disadvantaged businesses. Our request and recommendation is that, on design/build contracts, remove the automatic disallowance that your auditors are applying for the supply portion of a furnish-and-install subcontract with a DBE where the DBE did not make the first overture (quote request) to the non-DBE supplier. At the pre-bid stage when supplier pricing is needed for the proposal/bid but quantities are not known because designs are in a preliminary or conceptual stage, most DBE subcontractors do not have the contracting sophistication, size, or "clout" to obtain competitive, responsible quotes from the suppliers, often because work by the supplier is necessary to be able to provide a useful quote, and only the prime contractor can offer the supplier a guaranteed position on the prime contractor's team in return for the supplier's cooperation and work to develop a useful quote. Even if the DBE subcontractor does not make that first request for quote to the supplier, the DBE subcontractor will provide a very valuable CUF throughout the rest of the contracting and performance portions of the supply contract. By denying any credit for the supply portion strictly because they did not make the first request for quote to the supplier, opportunities for DBE subcontractors are lessened, not enhanced.

Issue 3 - Improving DBE Certification Application Forms

We applaud the intent to increase safeguards against improper businesses from getting certified as a "DBE." We would warn however that any regulatory additions or changes should not make it so hard or long to get certified as a DBE that legitimate DBEs are disinclined to start the process. The industry needs more legitimate DBEs, not less.

Very truly yours,



Kenneth Smith
Granite East Division Counsel